Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

TERM OCTOBER 1995

RICHARD BERGER AND JO ANN BERGER, PETITIONERS

v.

SUPREME COURT OF THE STATE OF CALIFORNIA, AND THE CALIFORNIA COURT OF APPEAL SIXTH APPELLATE DISTRICT

REAL PARTY IN INTEREST, THE CITY OF MORGAN HILL, CALIFORNIA, A MUNICIPAL CORPORATION

PETITION FOR WRIT OF CERTIORARI

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69 pp

QUESTION PRESENTED

A state should not impose its own doctrine of exhaustion of administrative and judicial remedies to frustrate a federal civil rights claim brought under 42 USC §1983.

Where a state court dismisses a federal taking claim against a municipal corporation brought under 42 USC §1983 upon the requirement that the state inverse condemnation claim for compensation must first be pursued, while simultaneously dismissing the inverse condemnation claim upon grounds that the exclusive state requirements of exhaustion of administrative and judicial remedies, as well as state based immunity, preclude recovery as a matter of law, has the state court impermissibly imposed impediments not intended by Congress to a claim brought under 42 USC §1983?

PARTIES

The California Supreme Court, Chief Justice Malcolm Lucas.

The California Court of Appeal Sixth District Justices, Patricia Bamattre-Manoukian, Nathan Mihara and William Wunderlich.

The Superior Court of the State of California in and for Santa Clara County, the Honorable John Flaherty and the Honorable Thomas Hansen.

Real Party in Interest, The City of Morgan Hill, California, a municipal corporation.

JURISDICTION

The California Supreme Court denied review by order dated November 15, 1995, 28 U.S.C §§1257, 2101.

CONSTITUTION AND FEDERAL LAWS CONSTRUED

Fifth Amendment, Fourteenth Amendment, 42 USC §1983 (See Appendix for text.)

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PETITION FOR WRIT OF CERTIORARI

FACTUAL BASIS FOR THE CASE

In 1976, petitioners Richard and Jo Ann Berger acquired a 5.7 acre parcel of land in the small general law city of Morgan Hill, California, approximately 30 miles south of San Jose. They immediately began to develop the property by creating a four lot subdivision, the purpose of which was to reduce the cost of offsite street improvements required for each stage of commercial development by dividing them amongst individual parcels. The first stage was to be a restaurant on one lot; the second, a bowling alley on the back two lots away from the main arterial street; and, third, a strip shopping center on the last lot fronting the arterial street.

Meanwhile, in an action unrelated to the Berger development, the City of Morgan Hill responded to a pressing need for additional sewer capacity by secretly, without consent or authority, installing a 20 foot deep 18 inch sewer line across the Bergers' property. Without revealing such installation to the Bergers, the City officials approached the Bergers with a contract offer to acquire an easement across their land. A deal was struck that the Bergers would obtain certain waivers of offsite improvements and fees in exchange for an easement.

While the terms of the acquisition of the sewer easement were being settled, the Public Works Director further offered the Bergers a contract to defer all of the offsite improvements, including those for phase 1, the restaurant, for one year, upon the consideration that the City could demand installation of all of the offsite improvements on all of the subdivided lots at the conclusion of the one year deferral. This contract was called the Deferred Improvement

Agreement (hereinafter referred to as "DIA") and was to be superseded by the sewer easement agreement. The Public Works Director even suggested that the DIA, which was prepared for recording on the land title of the Bergers would not be recorded in anticipation of being superseded by the sewer easement agreement.

In fact, the sewer easement agreement was developed into an oral agreement and in reliance thereon the Bergers committed to proceed with the bowling alley development and entered into contracts for its construction and acquisition of equipment. Unfortunately, however, the sewer agreement was not reduced to writing and the City possessed inconsistent records regarding the installation of the sewer since it was originally installed without permission due to the fact that its course had to be altered at the last moment for concerns of public health to avoid a City water well. Additionally, the Public Works Director retired from the City and was replaced by a new director.

In early 1977, upon Mr. Berger seeking to invoke some of the terms of the sewer easement agreement, the new Public Works Director told Berger that there was no deal, that the sewer line passed alongside his property, down a railroad easement next to the water well. Further, the new director told Berger that the DIA had been recorded and that all of the offsites would be required of him at the conclusion of the first year. Inquiries by Berger of other City officials, the City Manager, the Planning Director, confirmed the Public Works Director's statement, i.e., that there was no sewer line therefore no deal. Berger believed these misrepresentations since his understanding was that the need for the installation of the sewer line was a condition precedent to his obtaining any benefits under the sewer

easement contract.

Now Berger found himself bound to the DIA recorded as a lien on the title of his land without any deal to replace it. His bank, Wells Fargo, refused further advances on his construction loan until he could finance the $250,000.00 of offsite improvements which Berger had not anticipated. Because of the intervening unfinanced lien, the bowling alley project was abandoned. Berger obtained a financial partner to finish the restaurant, since his bank would not continue the financing for its construction because of the intervening lien.

Approximately 9 years later, Berger dissolved his partnership. While the proceedings were pending, he approached the City Manager regarding the lien for improvements in anticipation of receiving an inkind distribution of some of the property, still undeveloped except for the restaurant. The offsite improvements had not yet been installed and Berger was asking for pity's sake to be relieved of some of the obligations imposed by the DIA lien.

After several discussions, the City Manager, who was retiring suggested that Berger return to the former Public Works Director, who was now a private consulting civil engineer, to ask him about the sewer line and its impact on the DIA. Upon consulting with the engineer, he suggested to Berger that the sewer line was supposed to be installed which would vitiate the DIA lien, but the former Public Works Director indicated that he did not really know whether the sewer line had been installed.

Berger immediately approached the new City Manager and the new City Engineer to inquire regarding the sewer. They proceeded to investigate for him and returned and told

him that there was no sewer line on his property. He even discussed maps with Berger of the alternate route. Dissuaded by these misrepresentations, Berger dropped the issue.

In 1988, after the three remaining undeveloped lots were distributed to Berger from the partnership, discussion with the former Planning Director, now hired as a private real estate consultant by Berger, again, produced a suggestion that the sewer line was supposed to have been installed, which would accordingly alleviate the obligations under the DIA lien. Berger, again, approached the City Manager and a City Councilman as to whether there was a sewer and a corresponding agreement. This time repeated denials over a number of months did not dissuade Berger.

Finally, following a meeting over six months after he had first approached the City where the City Engineer, City Manager and City Attorney produced maps of the alternate location of the sewer line, even Berger's consultants, friends, loan broker and real estate agent told him he was "crazy." Relentless, Berger called his City Councilman and threatened to dig up his property until he found the mystery sewer (at the 20 foot dept, however, it is doubtful Berger would have found the line).

Miraculously, after 12 years of repeated denials, the City engineering department "found" the sewer line on Berger's property and confirmed this fact in a letter, dated July 13, 1989. After fruitless preliminary negotiation, Berger filed a claim for damages and for inverse condemnation on the sewer easement contract and for the recordation of the DIA lien, according to the California Tort Claims Act. Berger further requested that the City identify the location of the sewer line, since Berger could not obtain

title insurance to sell the property, lien or not, without disclosing the location of such an encumbrance. The City refused. Berger who had obtained the distribution of the three lots through short term financing lost the property in foreclosure unable to market it due to the lack of title insurability.

PROCEDURAL HISTORY OF THE CASE

Berger sued in State Court for inverse condemnation and in a separate action for fraud, breach of contract, precondemnation damages, as well as other theories. Berger additionally filed a federal action under 42 USC §1983 and a federal RICO action. The Federal District Court, the Honorable Robert Peckham, abstained from jurisdiction from the 42 USC §1983 claim and granted summary judgment on the RICO action.

The State Court action was then pursued with an amended claim under 42 USC §1983. The State Court dismissed the fraud claim, precondemnation damages, inverse condemnation and 42 USC §1983 claims prior to trial based upon California State immunity against claims arising from fraud or misrepresentation. (See California Government Code §818.8.)

Berger proceeded to trial on only two theories. The first a breach of the sewer easement contract and the second for negligent failure to disclose the location of the sewer line in 1989. The jury specifically found that Berger did not know of the location of the sewer line until July 13 of 1989, and returned a verdict on the breach of contract for the lost bowling alley development in the amount of $5.3 million and a verdict on negligent failure to disclose the location of the

sewer line in the amount of $1.265 million.

On a motion for judgment notwithstanding the verdict, the trial court struck the $1.265 million negligence award under the same immunity statute, California Government Code §818.8.

The Appellate Court reversed the contract award with no re-trial on the basis that the City officials who had entered into the sewer contract with Berger were without the requisite authority.[1] The Appellate Court refused to reverse on cross-appeal the dismissals of the claim under 42 USC §1983 the inverse condemnation or the negligence award.

The court upheld the state immunity against the inverse condemnation claim and the negligence claim and further found that Berger should have exhausted judicial remedies of administrative mandamus before proceeding with the inverse condemnation claims.

The court upheld the dismissal of the 42 USC §1983 claims, although ostensibly on different grounds from the trial court which had directly imposed state based immunity on the federal §1983 claim. The court stated that the Berger claim for the taking by the recordation of the DIA lien and the taking caused by failure to identify the location of the

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[1] It is significant to note that at trial there was no evidence offered contradicting the contract, and further that by resolution the City Council commissioned the acquisition easements for the project by the City Manager who was administrative head of the City, and later approved a use permit with a parking lot over one of the street the DIA required the Bergers to improve.

sewer line were both barred as being unripe. The court indicated that both claims were unripe because of the failure to pursue to conclusion the inverse condemnation claim which it had likewise found barred because of immunity against misrepresentation and because of failure to exhaust judicial remedies in form of mandamus. The court found that the claim for the imposition of the DIA lien was also unripe in that the regulatory action of imposing the DIA was not final because Berger did not reapproach the City Council and asked again to be relieved of the lien that he had entered into by contract.

The Appellate Court reversed with no re-trial and the California Supreme Court by entry of its order dated November 15, 1995, denied review without a hearing.

DISCUSSION

This Court in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City (1985) 473 US 172, 87 L Ed 2d 126, 105 S Ct 3108 discussed the differences between the taking compensable under the Just Compensation Clause of the 5th Amendment as opposed to a civil rights violation for violating the Due Process Clause of the 14th Amendment. (Williamson Co. Regional Planning, supra, 105 S Ct 3121, 3122) This Court observed that a taking requiring just compensation is not perfected until the landowner has shown that the inverse condemnation procedure is unavailable or inadequate, or until the procedure has been utilized. The due process violation that is tantamount to a taking is distinguished, however.

> ...under...[the Due Process theory]...government regulation does not

> effect a taking for which the Fifth Amendment requires just compensation; instead, regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of police power, violative of the Due Process Clause of the Fourteenth Amendment. Should the government wish to accomplish the goals of such regulation, it must proceed through the exercise of its eminent domain power, and, of course, pay just compensation for any property taken. The remedy for regulation that goes too far, under the due process theory, is not 'just compensation,' but invalidation of the regulation, and if authorized and appropriate, actual damages.

Williamson County Regional Planning Commission v. Hamilton Bank, (supra), 105 S Ct 3122.

Recent cases that involve such takings include Dolan v. City of Tigard (1994) 129 L Ed 2d 304, 114 S Ct 2309; Nolan v. California Coastal Commission (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141; First Evangelical Lutheran Church v. County of Los Angeles (1987) 482 US 304 96 L Ed 2d 250, 107 S Ct 2378.

In the case of Berger, the California Appellate Court discussed the takings as regulatory even though the recordation of the DIA lien which was not part of the original subdivision approval actually interfered with the title of the land as did the revelation of a previous installation of a sewer line without identifying its location. Although the Court of Appeal adopted the regulatory approach, the pleadings clearly allege both the regulatory and the physical

taking. More to the point, however, the Bergers' claims unequivocally arose from due process violations. Not the imposition of the lien for improvements, but the fraudulent manner of its attainment caused Berger's loss. Likewise, not the taking by installation of the sewer, but the failure to identify its location once its existence was known caused the loss in 1991. In determining whether to allow petitioners to proceed under their §1983 claims, the court addressed the takings as regulatory and applied the ripeness standards applicable to both inverse condemnation, as well as the §1983 claim, while additionally finding the inverse condemnation barred by immunity for fraud.

California set forth the standards for ripeness for an inverse condemnation claim in its recent case Hensler v. City of Glendale (1994) 8 Cal.4th 1, 32 Cal.Rptr.2d 244, 876 P.2d 1043. This Court set forth the criteria for ripeness for a due process violation in the case of Williamson Co. Regional Planning Commission v. Hamilton Bank, supra. The California Supreme Court applied to its inverse condemnation proceedings an obligation on the part of the landowner to seek relief by way of mandamus and/or declaratory relief as a remedial action prerequisite to a ripened claim for compensation. This Court has not endeavored to question California's imposition of its exhaustion of judicial remedies in determining entitlement to just compensation for taking, leaving the process to the states. (See Agins v. Tiburon (1980) 477 US 255, 655 L Ed 2d 106, 100 S Ct 2138.) However, exhaustion of remedies is not a proper basis for determining ripeness of a claimed due process denial under 42 USC §1983. The Williamson Co. Regional Planning case distinguished between exhaustion of remedies versus the bringing of a regulatory claim to finality.

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. Patsy concerned the latter, not the former. The difference is best illustrated by comparing the procedure for seeking a variance with the procedures that, under Patsy, respondent would not be required to exhaust. While it appears that the state provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, (citations deleted), respondent would not be required to resort to those procedures before bringing its section 1983 action, because those procedures clearly are remedial. Williamson County Regional Planning v. Hamilton (1985) 473 US 172, 192, 105 S Ct 3108, 3120.

Thus, the standard for ripeness in a denial of due process claim sought to be enforced through §1983 may be dramatically different from the standard for ripeness under state inverse condemnation law; the latter requiring remedial judicial action and the former not.

Although the California Appellate Court recognized that the Berger claim was improperly dismissed based upon state immunity under Government Code section 818.8 in that municipal corporations are not the invocation of state immunity by the state, but are persons under 42 USC §1983, (Howlett v. Rose (1990) 496 U.S. 356, 110 L.Ed.2d 332, 110 S.Ct. 2430 and state immunity does not bar an action for damages brought under 42 USC §1983 against a person, (Martinez v. California (1980) 444 U.S. 277, 62 L.Ed.2d 41, 100 S.Ct. 553) the Court of Appeal nevertheless upheld the dismissal suggesting that the Berger claim was not yet ripe.

With regard to the DIA lien, the court suggested that the DIA contract which had been entered into by the Bergers' based upon fraud by the City was not a final administrative determination because the Bergers upon learning that no sewer contract was to follow did not return to the City Council to request reconsideration of the executed recorded agreement. There was no procedure, however, for the Bergers to invoke in order to further finalize the agreement and the court's suggestion was that the Bergers had a duty to go back to the City in an informal fashion in an attempt at remediation, i.e., to remedy the imposition of the lien on the basis of the City's original fraud. The second ripeness requirement imposed by the California Court of Appeal was that the Bergers did not seek judicial remedial action in the form of mandamus, either with regard to the DIA lien or with regard to the 1989 cloud on the title caused by the revelation of the existence of the sewer line without an identified location. In both of these situations, the court is applying the Hensler doctrine of exhaustion of remedies to the §1983 claim as opposed to the perfection to finality of the regulation. For instance, there was no procedure for

obtaining a variance or exception from the DIA. What is suggested by the Court of Appeal is purely a remedial action even one without any prescribed procedure whatsoever.

The court additionally maintained that the §1983 claims were unripe because of the failure to exhaust the inverse condemnation while at the same time contending that the inverse condemnation claims were unripe by applying the failure to exhaust judicial remedy doctrine set forth in the California decision Hensler v. City of Glendale, supra. Finally, the Court barred the entire condemnation remedy because of state immunity for damages based upon fraud.

This Court in an opinion by the Honorable Justice O'Connor in Patsy v. Florida Board of Regents (1982) 457 US 496, 73 L Ed 2d 172, 102 S Ct 2557 recognized the paramount role Congress assigned to the federal courts to protect constitutional rights and categorically stated that exhaustion of administrative remedies is not a prerequisite to an action under §1983. This had been the unequivocal position of the court in the 19 years preceding Patsy. By denying the §1983 claim to the Bergers, however, on the basis that an inverse condemnation claim had not been pursued which was barred for failure to exhaust administrative and judicial remedies, the California Court has effectively imposed a requirement upon the Bergers that does not exist under §1983 claims. Likewise, the round about imposition of state based immunity on the §1983 claim is also effectuated by finding that the inverse condemnation remedy was adequate, yet barred under immunity and that, accordingly, the §1983 claim was barred for failure to exhaust the inverse condemnation remedy.

The practical effect of the court's position in Berger

imposes requirements on §1983 actions which neither this Court nor Congress ever intended to exist, i.e., exhaustion of administrative remedies and fitting within exceptions to state based immunity.

The effect of this circular reasoning is the complete deprivation of the Bergers' property without due process of law and with no compensation.

But for the City's misrepresentation that it would enter into a superseding contract for the sewer easement upon its installation, the Bergers would not have entered into the DIA lien. But for the City's misrepresentation that it had not installed the sewer, the Bergers would have objected to the imposition of the DIA lien through remedial action. But for the City's failure to disclose the location of the sewer line on the Berger property once the installation was revealed the Bergers would not have lost their land. The Bergers lost their property through the City's actions which were devoid of due process of law.

It is ironic to note that the same fraudulent actions by the City which constituted the due process deprivation kept the Bergers from pursuing remedial action. With the installation of the sewer kept secret, Berger had no way of knowing he had a right to object to the DIA lien. The Appellate Court's disregard for the due process violation is illustrated by their description of taking by appropriation.

> A taking may also be accomplished by simply exercising dominion over the property...when there had been no purchase and no condemnation action, no deed is recorded. Nevertheless, the taking is entirely proper if it

is for a legitimate public purpose.

A taking without due process by mere appropriation is repugnant to the very foundations of constitutional freedom from arbitrary tyrannical government. The imposition of a requirement to proceed to claim compensation under inverse condemnation the prerequisites of which deny compensation because the manner of taking was so violative of due process that it interfered with the landowners' notice to seek remedial action, or made the government outrightly immune, is no compensation remedy at all.

The Bergers' §1983 claim has been frustrated by the imposition of California's requirements of exhaustion of administrative and judicial remedies and state based immunity. The result leaves the federal protection under §1983 for such a deprivation impotent and illusory.

Respectfully submitted,

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IN THE SUPREME COURT OF CALIFORNIA
S049205

Sixth Appellate District No. H011759

RICHARD BERGER, Et Al., Appellants

v.

CITY OF MORGAN HILL, Appellant

Appellants' petition for review DENIED.

LUCAS
Chief Justice

Appendix 1

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

RICHARD BERGER, et al.,

Plaintiffs and Appellants,

V.

CITY OF MORGAN HILL,

Defendant and Appellant.

H011759
(Santa Clara County Sup Ct. No. 687887)

OPINION

In 1976 in the City of Morgan Hill (City) there was a sewage crisis. Population growth and development had far exceeded City's expectations, and in places raw sewage was overflowing onto the streets. To increase its sewage capacity City hastily designed and built the Downtown Sewer Bypass Project. Further development was pending and planned at the time City built this project.

A portion of the new sewer project passed near land that was under sale contract to plaintiffs, Richard and Jo Ann Berger (collectively Berger). To avoid drinking water well, City placed a sewer line under Berger's land. In exchange for this sewer easement, City (which had no money) orally

promised Berger a host of development concessions. Over the next 14 years as personnel turned over, City vacillate on whether there even was a sewer line under Berger's property.

Berger sued on the 1976 oral agreement in 1989. City appeals from the jury's $5.3 million verdict in Berger's favor. For the reasons stated below, we reverse that judgment. We affirm the judgment on Berger's cross-appeal.

FACT

While City was building the sewer project it was discovered that the sewer line would run impermissibly close to a drinking water well near Railroad and Dunne Avenues. To correct this problem, the sewer line needed to be run under the land Berger was buying. Berger's 5.7 acre undeveloped lot, near the railroad tracts, was capable of being divided into four parcels. It had streets on three sides: Diana Avenue to the north, Railroad Avenue to the west, Dunne Avenue to the south, and on its east side was other, privately owned property.

City asked Berger for permission to build a sewer underneath the edge of the four-parcel lot he was acquiring. City officials including George Lewis, City Engineer, approached Berger who then granted the City permission to install the sewer line. Since the sewer line was being built as they spoke, City and Berger agreed to work out the details of their bargain later. Berger had 10 or 12 meetings with City officials during the last four months of 1976. Because the City had no money to pay for the sewer easement, the City promised Berger development concessions. City through its agent Geary Coats, the Planning Director and Assistant City Manager, promised: 1) to waive development

fees; (2) to waive offsite improvements (sidewalks, gutters, street paving) and to abandon part of Railroad Avenue and allow it to revert to Berger; and 3) to cooperate in the development process which included providing favorable zoning.

City required Berger to sign a standard contract called a Deferred Improvement Agreement (DIA) although it did not reflect the bargain between Berger and City. This standard contract granted a developer who was subdividing property a temporary reprieve in terms of building offsite street improvements. That is to say, a developer who subdivided a parcel at that time in Morgan Hill was required to pay for the construction of gutters, sidewalks and the paving of the street to the midpoint alongside his or her property. Berger's DIA, which was typical, provided that he was not required to make the offsite improvements for one year, but that after a year, City could "call" them, meaning that City could immediately require Berger to build the improvements at his own expense.

Berger did subdivide the lot into four parcels, and he moved a building from another place and used it as a restaurant on one of the parcels. Berger also had plans to operate a bowling alley on the parcel next to the restaurant. Toward that end, Berger applied for a use permit in later 1976, which had to be approved by the Planning Commission and by the City Council. The plans submitted in support of the use permit for the bowling alley showed a parking lot over part of Railroad Avenue, with Diana converted into a cul-de-sac. The use permit, with improvements along Railroad Avenue deferred, was approved.

Time passed. Berger did not know whether or not the

sewer had been installed because he was not living on the property. In 1977 a new Public Works Director, Bill Wren, told Berger there was no sewer line under his property and that the City would call the improvements required by the DIA. Wren's statement was contrary to Berger's deal with City. Berger attempted to get more financing to pay for the offsite improvements, but was unable to do so. Berger had to abandon the bowling alley project and content himself with running the restaurant. There is some evidence that City gave Berger a $3,000 credit in his sewer hookup for the restaurant, theoretically in exchange for the sewer easement.

More time passed and in 1985 Berger contacted John Moreno, who had come out of retirement to serve as the interim City Manager. Berger inquired about revising the DIA so that street and utility improvements could be made on a lot by lot basis as each lot was developed. Berger also asked if the lots bordering Diana Avenue could be rezoned for commercial use (they had been zoned down twice since 1976). Berger was also concerned about sewer capacity in light of a sewer moratorium and a growth control measure. Berger did mention the proposed sewer line and the sewer easement to Moreno at this time. Because Wren had said in 1977 that the sewer line was not under Berger's land, Berger did not insist upon specific enforcement of the promised concessions by City at this time.

Moreno told Berger he should contact George Lewis (the former City Engineer) about the sewer line, and Berger did so. On July 3, 1985, Lewis confirmed in writing that the sewer line had been installed. Moreno said he would bring the matter to the attention of incoming City Manager Fred Mortensen.

Mortensen asked Robert Howard, who had replaced Wren as the City Engineer, to follow up on the matter. Howard testified, contrary to the testimony of any other witness, that he and Berger went out and looked at the property and Berger showed him where the sewer line was located by pointing out manhole covers at ground level. Howard agreed that if the City had not already provided compensation, Berger was entitled to be paid. Berger said nothing to Howard about the 1976 oral agreement with Coats even though Lewis had now confirmed that the sewer line had been installed. Instead, Berger told Howard what he really wanted was sewer allocation. Accordingly, after determining that the sewer easement was worth about $22,000 in 1985 land values, Howard prepared a memo to the City Council recommending that Berger be given the comparable value in sewer allocation, or 3,300 gallons of sewer capacity. The City Council approved Howard's recommendation at its November 1985 meeting. Howard testified he called Berger and told him that the Council had approved the in-lieu compensation, and sent him the sewer allocation application, which was the form Berger needed to fill out. Howard never heard from Berger again.

Berger testified Howard did not call him. Berger apparently misunderstood the sewer application; he believed that he had been promised a certain amount of sewer capacity, and he did not think he had to apply for it. Consequently, upon receiving the application, he wrongly believed he was being treated just like anyone else, and he disregarded the application. Berger thought he was <u>not</u> being given in-lieu compensation in sewer capacity for the sewer easement. Berger did not call Howard to ask what the application form meant.

Several months later Berger contacted City again and spoke with Mortensen. Berger testified that both Mortensen and Howard said that there was no sewer line across his property, so that he had no greater right to defer offsite improvements than any other developer.

By this time Berger had been through some financial reverses. He had mortgaged other commercial and residential property in order to keep the restaurant afloat. Finally, he had to take a money partner to invest in the restaurant. During the partnership, title to the real property was vested in the partner. After a lawsuit which resulted in the dissolution of the partnership, the partner was awarded the lot with the restaurant on it, and Berger was awarded the three undeveloped lots, under two of which the sewer line possibly ran.

In 1988 Berger reacquired the lots from the receiver (following the partnership lawsuit), and was thinking about selling them. Berger hired Coats, who, after leaving public service, became a private consultant representing developers before the City. Coats was to help Berger get the DIA changed, have the lots rezoned, and obtain sewer capacity. Berger told Coats that in 1985 Lewis had said the sewer line was on his property, but that Mortensen insisted the line was built along Railroad Avenue parallel to the railroad tracks. As Moreno had said in 1985, Coats said that George Lewis would know. Berger and Coats met with Lewis in September of 1988. Lewis was now working at the engineering firm that had prepared the plans for the Downtown Sewer Bypass Project. Lewis pulled the as-build plans from the firm's archives, and they showed the sewer line jogging around the water well and underneath the edge of Berger's property.

Coats and Berger then met with the City Attorney, showed him the as-built plan, and claimed that Berger was entitled to the development concessions promised in 1976. After a second meeting in November 1988, Coats wrote a letter listing all the development concessions to which Berger claimed he was entitled: 1) the abandonment of Railroad Avenue with the property reverting back to Berger; 2) the elimination of street and utility improvements along Railroad; 3) the waiver of all development fees; 4) cooperation with future development plans, which now meant rezoning for commercial use; and 5) providing sewer capacity. Although this was 12 years after the fact, according to City it was the first time that Berger told any City official what his original bargain with Coats had been.

In February 1989, Mortensen acknowledge Coat's letter. In May, the City Attorney wrote to Berger, trying to accommodate him by stating that some of the concessions--deferring the improvements on Railroad, rezoning, and sewer allocation--could probably be implemented through a development agreement. The parties met again in June. By then, however, Mortensen had been told by a new Public Works Director that based on plans he reviewed, the sewer line might run down Railroad Avenue parallel to the tracks, and not on Berger's land. According to Berger, at the June meeting Mortensen and City Attorney Mr. Hynes specifically disavowed that the sewer line ran across Berger's property.

Frustrated by this turn of events, and under financial pressure and needing to refinance or to sell the property, Berger called a City Councilman and threatened to use a back hoe in front of a newspaper reporter to find the sewer line on his property. The Councilman pressured the City to locate the sewer line on Berger's property. A City employee

using a metal detector discovered the manhole covers over the sewer line on Berger's property within one hour. The manholes were buried some 6 to 12 inches under the surface of the land, and the property appeared to have been disked[2] recently. By special interrogatory, the jury did find that Berger first learned for certain that the sewer line was under his land in July 1989. The City Attorney confirmed in writing on July 13, 1989, that the sewer line was on Berger's land.

PROCEDURAL BACKGROUND

Several weeks after receiving the City Attorney's letter, Berger filed an inverse condemnation action against City alleging the taking of the easement for the sewer line without just compensation. On May 21, 1990, Berger filed a second action alleging breach of an oral contract and fraud. The two actions were consolidated, and following multiple demurrers, amendments and in limine motions, Berger had two claims that were tried to the jury: 1) breach of an oral contract, and 2) negligence--i.e., City's breach of the duty to record a document showing where the sewer easement was located. Berger's claim with respect to the negligence cause of action was that he could not sell the property with an unlocatable, unrecorded sewer easement, because he was unable to procure title insurance. The trial court had ruled that the failure to record a sewer easement could not constitute a slander of title, because a slander of title necessarily involves a false publication regarding the land (and here the complaint was that City failed to publish).

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[2] Vacant property in this area is "disked" or periodically has the dirt turned over by a tractor to prevent weed growth, as a fire control measure.

At trial Berger's expert, one John Branton, testified as to the profits Berger would have made had he been able to operate the never-built bowling alley on the land as planned. (By this time, of course, Berger had lost the land in foreclosure, due to the inability to sell it because of the unlocatable, unrecorded sewer easement.) In any event, the expert assessed Berger's damages for the loss of value of the never-built bowling alley at $5.306 million, and the jury returned a verdict in Berger's favor in that amount. With respect to the negligence claim, the jury return a verdict also in Berger's favor, in the amount of $1.265 million. The trial court granted judgment notwithstanding the verdict (JNOV) for the City on the negligence claim, ruling there was no duty on City's part to record an easement reflecting the location of the sewer line. We proceed to City appeal first.

DISCUSSION

I. APPEAL

After careful review of the facts and the law, we have determined that the verdict in Berger's favor on the breach of oral contract claim cannot be upheld as a matter of law. This is so because a public entity cannot be bound to a purported contract allegedly made by a public employee who did not have the authority to do so. Indeed, Richard Berger, a seasoned developer, should have realized that ever land use request normally must be acted upon by the City Council. However, in this case, he claimed that he could enter into a binding oral contract with the assistant City Manager -- to abandon a public road, to eliminate the street and utility improvements required under the Subdivision Map Act (Gov. Code, §§66410 et seq.), to waive all development fees, and to guarantee zoning and sewer capacity -- in perpetuity, without any action whatsoever by the City Council.

Controlling law prohibits such bargains in order to protect public entities and to protect the public fisc.

Initially we take up the question of the proper standard of review since the parties disagree about it. Berger contends the substantial evidence rule applies -- i.e., the trial court's determination that City officials had the authority and did contract with Berger for the sewer easement, should be upheld if supported by substantial evidence. City, on the other hand, contends that whether City officials had the authority to contract with Berger as they did is a legal question, because the authority of a City official is derived from statute and ordinance. (Gov. Code, §34851, 34852.) We have concluded the issue is a legal one subject to the independent review standard. Unless the City officials had the authority to act, the actual facts of how Morgan Hill officials conducted the City's business become irrelevant.

A public entity is not bound by a contract entered into by a public official or employee who is without authority to contract. This principle was established over 130 years ago in Zottman v. San Francisco (1962) 20 Cal. 96. In that case a City refused to pay for construction work authorized by a City superintendent, when the work was not approved by the City Council after a public bidding process. The California Supreme Court held that the contractor's breach of contract claims must be dismissed. Although every member of the City Council was aware that the contractor was doing the work, still, because the contract was not awarded by the City Council after the required bidding process, it was void and unenforceable as against the City. (Id. at pp.100-105.)

California courts have often relied on this principle in deciding cases. In Bear River etc. Corp. v. County of Placer

(1953) 118 Cal.App.2d 684, for instance, the Court of Appeal held that a written contract for the purchase of crushed rock, approved by the county road commissioner, was unenforceable. The court noted that the road commissioner was without power to negotiate such a contract, was the board of supervisors unless it advertised for bids. (Id. at 0.689.) "When the power of a board or public officer is limited to a prescribed method of contracting, the mode prescribed becomes the measure of the power. If the prescribed mode is disregarded, the contract is void and unenforceable." (Ibid.)

Thus, the provider of the crushed rock could not recover for the following reason: "One who deals with a public officer stands charged presumptively with full knowledge of that officer's powers and is bound at his peril to ascertain the extent of his power to bind the government of which he is an officer, and any act of an officer to be valid must find express authority in the law or be necessarily incidental to a power expressly granted. [Citation.] While the courts will go to all reasonable lengths in interpreting the status conferring powers upon the officers of the state in order that the laws may be given effect and the ends of justice subserved, they cannot by construction confer upon any officer an authority which the Legislature has seen fit to withhold. [Citations.]" (118 Cal. App.2nd at p. 690.)

Many other cases exemplify this principle. In San Francisco Internat. Yachting Ect. Group v. City and County of San Fanncisco (1992) 9 Cal. App.4th 672, 675, appellants sought to enforce leases granted by the San Francisco Port Commission which were not approved by the San Francisco Board of Supervisors. The appellate court held that appellants could not enforce these contracts,

because to be valid they needed to be approved by the supervisors. Because they were not, no valid contract was formed, and appellants could not prevail. (Id. at pp. 682, 684.) Also, in McCann v. City of Los Angeles (1978) 79 Cal. App. 3d 112,plaintiff built a building on his property that was specially reinforced so as not to interfere with a sewer running underneath the land. Plaintiff relied on several theories of recovery, among them on that Los Angeles was bound to reimburse him for the extraordinary costs of the special reinforcements, based on the promise of a deputy City Attorney. (Id. at p. 118.) The court held that the judgement could not be supported on that theory. (Id. at p. 119.) The deputy City Attorney's oral promise could not bind the City to a $32,000 contract, in violation of the City charter provisions requiring such contracts to be in writing and signed by authorized persons, following bidding procedures. Although plaintiff claimed he relied on the promise, estoppel cannot be applied against a government entity when it would result in the nullification of a strong rule of public policy. Furthermore, there was no evidence plaintiff would not have built this building over the sewer absent the deputy City Attorney's promise to pay. (Ibid.)

A corollary of the fundamental rule that such contracts entered into without authority are not binding, is that one who contracts with a public official must ascertain the extent of the official's authority. The long-standing rule is: "One dealing with public officers is charged with the knowledge of, and is bound at his peril to ascertain, the extent of their powers to bind the state for which they seem to act. And, if they exceed their authority, the state is nit bound thereby to any extent. [Citations.]" (Mullan v. State (1986) 114 Cal. 578, 587; Burchett v. City of Newport Beach (1995) 33 Cal. App.4th 1472, 1479.)

Again, where a contract is entered into without the following the mode prescribed by statute, or municipal charter, such a contract is unenforceable. This is so because the measure of authority of the officials to make such contracts is delimited by statute. Thus, in Miller v. McKinnon (1942) 20 Cal. 2d 83, 88-89, the court declined to enforce a contract entered into without a competitive bidding process, where such a process was required by statute. The court stated: "Persons dealing with public agency are presumed to know the law with respect to the requirement of competitive bidding and act at their peril." (Id. at p. 89; see also Bear River Ect. Corp. v. County of Placer, supra, 118 Cal. App.2d at p. 690.)

These rules we have discussed are grounded on two fundamental public policies. First, they protect the integrity of local governing bodies by insuring that their authority cannot be compromised by the acts of unauthorized officials and employees. Second, they protect the public's interest in the preservation of public resources by insuring that funds or resources are expended only in the manner authorized by law. (See e.g., Miller v. McKinnon, supra, 20 Cal.2d at pp. 89-90.) In the instant case we concluded that Assistant City Manager Geary Coats has no authority to enter into an agreement for the acquisition of a real property interest by the City Council to the development concessions that Berger claims. To reiterate, these concessions were: 1) abandonment of Railroad Avenue and reversion to Berger; 2) elimination of offsite improvements along Railroad Avenue; 3) waiver of all development fees; and 4) City's cooperation in executing any further development plans of Berger, including providing favorable zoning and guaranteeing sewer capacity, despite a subsequently-enacted sewer moratorium and slow growth measure. The trial court correctly ruled on

in limine motions that Berger could not enforce the promise to abandon Railroad Avenue or a promise to rezone Berger's property, because those acts can only be performed by a legislative governing body in accordance with the procedures required by applicable statute. We believe, however, that the trial court's ruling was too limited; we find also that the Assistant City Manager lacked the authority to make any legal promises. No City official or employee has the authority to enter into a contract for the acquisition of real property by a city. On the contrary, the authority to acquire property for public use is vested by statute in the governing body,here,the City Council. (See Gov. Code, §§37350, 27281, 34000.) [3]

Thus, for City's acquisition of real property, action by the City Council is required. (See Ocean Shore R.R. Co. v. City of Santa Cruz (1961) 198 CaL. App.2d 267, 272-273; Schmidt v. City of Millbrae (1954) 129 Cal.App.2d 791, 792.) Applying this basic rule to the case at hand, it is clear that only the City Council had the authority to acquire the public sewer easement from Berger. In addition, we find

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[3] Government Code section 37350 provides: "A city may purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit."

Government Code section 27281 sets out the requirement that the legislative body (e.g., city council) must certify acceptance of a deed to real property on behalf of a public entity (e.g., a city). Government Code section 34000 defines "legislative body" as a city council or other governing body of a city.

that Assistant City Manager Coats did not have the authority to commit City to the development concessions as promised. The position of City Manager or Assistant City Manager is a creation of statute and municipal ordinance. Such an official therefore has only the authority expressly conferred on that office by law, or which is necessarily incidental to other powers conferred. (Allen v. McKinly (1941) 12 Cal.2d 697, 707-708; Bear River ect. Corp. v. County of Placer, supra, 118 Cal.App.2d at pp. 689-690.) The source of Coat's authority as Assistant City Manager was twofold. First, state law provides that the City Council has the sole authority to govern a municipality and that the City Manager's duties shall be conferred by ordinance. (Gov. Code,§§34851, 34852.) Second, the Morgan Hill ordinance conferring powers and duties on the City Manager in 1976, called ordinance No. 400, New Series, did not give the City Manager, let alone his assistant the authority to enter into any contracts, except for contracts to purchase supplies for City departments.[4] Furthermore, Ordinance No. 47 itself expressly provides that final action an subdivision matters has to be taken by the City Council.[5] The ordinance specifically

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[4] Section 4 of Ordinance No. 400, New Series, describes the city manager's powers and duties. These are administrative in nature and include keeping financial records, appointing and dismissing employees, keeping the city council informed and attending its meetings, ect. Entering into contracts to purchase real property is not an enumerated power of the city manager.

[5] City's first and second request for judicial notice are granted. Ordinance No. 47 is a long and detailed one regulating the subdivision of land within Morgan Hill. It sets out the procedural requirements for obtaining approval of

spells out the procedures to be followed before such an action can be taken. Accordingly, every final action taken on Berger's various land use and development requests should have been taken by the City Council. In sum, Coats was not authorized by statute or ordinance to bind the City to any contract to acquire an interest in real property. Nor was he authorized to bind the City to any contract concerning land use and development, since such power is vested in the City Council. Indeed, Coats admitted that only the City Council could change or eliminate conditions imposed under a subdivision map. Still, Berger claims that the promise to eliminate the street and utility improvements required under the subdivision map was the single most important promise Coats allegedly made, and the breach of that promise was the sole basis of Berger's $5.3 million damages claim for the value of the never-built bowling alley.[6] Furthermore, Berger was charged bylaw with knowing the scope and the limit of Coat's authority. Because Berger had made many land use requests before, he was or should have been fully aware that he could rely upon what was said by the planning staff, or even by the planning commission, until it was approved by the City Council, and only then it would become final and binding. While Berger might have believed

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tentative and final maps, sets out the duties of involved city officials and bodies, and describes the power to approve (or disapprove) such maps as belonging solely to the city council.

[6] The analysis does not change even if it were Lewis, the city engineer, who made these promises to Berger. He too had no authority to make contracts on behalf of the city. Again, his duties are defined by ordinance. (Miller v. City & County of S.F. (1960) 187 Cal. App.2d 480, 483.)

that Coats could negotiate a proposes easement agreement that he would recommend to the City Council, he could not reasonably believe that Coat's promises were binding, absent approval from the City Council. Controlling law dictates that such an agreement is not binding and that it cannot be enforces against City. Coat's alleged promise that City would cooperate with any and all Berger's future development plans was also an invalid and unenforceable restraint on the City's inherent police powers. In refusing to enforce a contract that allegedly prohibited the county from changing zoning, we stated that land use regulations implicate the exercise of sovereign's police power. "A government 'may not contract away its right to exercise the police power in the future. [Citations.]' [Citations.]" (Delucchi v. County of Santa Cruz (1986) 179 Cal.App.3d 814, 823.) Such a contract is unenforceable as contrary to public policy. (Ibid.)

Coat's promise to cooperate in all future development plans with Berger constituted an impermissible restraint on its zoning authority and, if enforceable, would have required City to waive subsequently enacted land use controls, such as the anti-growth measure and the sewer moratorium. As we held in Delucchi v. County of Santa Cruz, supra, 179 Cal.App. 3d 814, both as a matter of sovereign power and as a matter of fundamental public policy, the City at all times restrains the right to change the land use controls that apply to any property including Berger's. Berger could not demand guaranteed zoning or claim to be excepted from later-enacted growth controls, and Coats could not bind the City Council in perpetuity.

Briefly we take up several of Berger's arguments regarding the authority issue. Berger argues that because

Coats was the Assistant City Manager an purported to act on behalf of City, he had authority to bind City. The theory of ostensible authority does not apply. This is so because it must be conducted by the principal that leads a third person to believe the agent is authorized to act. (See Civ. Code, §2317.) In any event, traditional ostensible authority theory does not apply as a public entity. One who contracts with a public officer is charged with the knowledge of the officer's scope of authority.

Berger's argument that a sewer bond resolution passed City Council in June of 1976 [7] authorized the Assistant City Manager to act is also without merit. The resolution does not confer authority on the City Manager or his assistant to enter into contracts acquiring lands or easements. This resolution simply does not assist Berger.

Berger also argues that even if Coats had originally not been authorized to act, the City Council ratified the alleged oral agreement in December of 1976 by approving the conditional use permit for the proposed bowling alley. Unfortunately, Berger never asked for a ruling from the trial court on this issue, nor was it an issue that was submitted to the jury. Thus, Berger waived any such claim by not having

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[7] City Council Resolution No. 1174 and its companion Resolution No. 1208 express the City Council decision to issue sewer revenue bonds. The city manager is not mentioned in resolution No. 1174, and contrary to what the trial court stated, it does not give the city manager authority to obtain the necessary easements. The purpose of Resolution 1174 is to satisfy the requirement of Health and Safety Code sections 4950, 4966 of a brief and general description of the scope of the proposed public sewer project.

raised it below. (Phillips v. Noble (1958) 50 Cal2d 163, 166-167.)

Even if the theory had not been waived, the facts of the City Council's conduct show that as a matter of law it did not ratify the agreement as alleged by Berger.[8] Berger's application for a conditional use permit was granted subject to the planning commission's recommendations. These recommendations included dedicating and improving with standard street utility improvements on Diana and Railroad Avenues. It was also recommended that the improvements on Railroad be deferred subject to the City Engineer's approval. Thus, we can see that the City Council did not eliminate the requirement for street and utility improvements, but merely deferred for a time some of the improvements to be made along Railroad. There is no evidence the Council waived any and all development plans in perpetuity.

We conclude that the oral agreement Coats supposedly made was the consummate ultra vires act. This agreement was void and unenforceable from the beginning for many reasons. Because there was no enforceable contract, there can have been no breach of contract. It follows the City's motion for JNOV should have been granted. Therefore we will reverse the judgement, and direct that judgement be entered for the City. (Code Civ. Proc.,§629.) Because the authority issue is dispositive, we need not reach City's other assignments of error on appeal.

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[8] Where only one reasonable conclusion is possible, the issue of whether a principal ratified his or her agent's acts can be determined as a matter of law. (Shultz Steel Co. v. Hartford Accident & indemnity Co. (1986) 187 Cal.App.3d 513, 523-524.)

II. CROSS APPEAL

On the cross-appeal Berger complains that the trial court erroneously granted JNOV in the City's favor on the negligence claim and also erred in adopting the previous judge's rulings on demurrer, to wit: sustaining without leave defendant City's demurrer to Berger's claims for inverse condemnation as to the entire property and violation of civil rights under 42 USC section 1983. (Hereafter section 1983.)

The issues posed on the cross-appeal are pure questions of law which we exercise our independent judgement. (Gruenberg v. Aetna Ins. Co. (1973) Cal.3d 566.) We have concluded after careful review that these claims do not have merit and that judgement on each was properly entered for the City.

A. Grant of JNOV

During in limine proceedings, in the course of discussing the slander of title cause of action, the trial court stated that the failure to record the easement could not be a slander of title but that possibly it was negligence. Berger then argued, instead of slander of title, a negligence theory based on City's failing to prepare and record a deed of the sewer line easement. The court allowed Berger to amend his fourth amended complaint to add a negligence cause of action. Berger argued that City, having place a sewer line under his property, was under a tort duty to record a sewer line easement in order to inform him of the location of the sewer line. Berger proposed the following instruction, which the trial court gave to the jury, over City's objection: "It is the duty of a city, such as the defendant City of Morgan Hill, in acquiring easements from private property owners to

take such steps as are reasonable and prudent in perfecting the City's property interests. [¶] Once a sewer has been installed, the City has the duty to inform the property owner as to the exact location of the sewer and provide the owner with a legal description of the easement required. A failure to fulfill any such duty is negligence."

Berger did not produce any authority that supported such a tort duty, and the trial court expressed some revisions in giving this instruction to the jury. Furthermore, since it was undisputed that no deed for the sewer line easement was ever recorded, the instruction had the effect of directing a verdict against the City, and the jury duly returned a verdict in Berger's favor of 1.265 million dollars. City moved for JNOV on the ground that no tort duty exists as a matter of law and also that governmental immunity applied. (Gov. Code, §818.8 [public entity not liable for negligent or intentional misrepresentation].) The trial court agreed and granted JNOV on both grounds.

We find no authority for the proposition that a City owes a tort duty to procedure and record a deed of the sewer line easement. Neither the law of eminent domain nor real property law imposes such a duty on a public entity.

Under the power of eminent domain, for instance, a public entity has an absolute right to take private property for public use, including for utility easements. (Pacific Gas & Electric Co. v. Parachini (1972) 29 Cal.App.3d 159, 164.) A public can accomplish a taking through a negotiated purchase or a condemnation action. (Code of Civ. Proc., §§1230.010 et seq.; Melamed v. City of Long Beach (1993) 15 Cal.App.4th 70, 79-8-.) A taking may also be accomplished by simply exercising dominion over property.

(Moerman v. State of California (1993) 17 Cal.App.4th 452, 457.) When there as been no purchase and no condemnation action, no deed is recorded. Nevertheless, the taking is entirely proper if it is for a legitimate public purpose. The public entity must, of course, compensate the owner for the fair market value of the property, and to that end the owner may bring an inverse condemnation action. (Cal. Const. art I, §19; Hensler v. City of Glendale (1994) 8 Cal.4th 1, 9-14.) According to Berger's theory of tort duty, every inverse condemnation action would become an action for negligence as well. Clearly this is not law.

Berger's theory does not comport with real property law either. According to real property law, a public entity, like a private party, cam acquire ownership of property through prescriptive use. (Reinsch v. City of Los Angeles (1966) 243 Cal.App.2d 737, 744.) A party who obtains an ownership interest by prescriptive use does not incur liability to the property owner. (Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal.3d 564, 574.) However, under Berger's theory, a public entity could never acquire an easement by prescription without also being negligent at the same time, because when prescriptive rights are acquired the new owner does not procure or record a deed.

We must reject Berger's argument that the tort duties owed by the City arose from the alleged oral easement contract itself. Berger asserts that the covenant of good faith and fair dealing implied by law into the easement contract inherently obligated City to procure and to record a deed of the easement, and that a breach of those duties is actionable in tort.

First of all, the implied covenant of good faith and

fair dealing does not add additional, substantive obligations to a contract. (Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 698-699, fns. 39 and 41.) Thus, the implied covenant may not be used to imply additional contract duties. Secondly, a breach of the implied covenant is not actionable in tort in any event, except in the context of a "special relationship," such as that between an insurer and an insured. Even if the proposed duty could be implied into the contract through means of the implied covenant, which it cannot, any breach would be actionable only as a breach of contract, and not as tort.

Berger's reliance on Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal.3d 752, is misplaced. In that case the California Supreme Court held that under the unique circumstances of the case, the defendant could be liable for a tortious denial of the existence of the contract. (Id.) at pp.769-770.) Seaman's does not hold that the implied covenant of good faith and fair dealing may be used to imply obligations into the contract other than those stated in its terms. Nor does it hold that every breach of the implied covenant is actionable in tort.

As the trial court recognized, the gravamen of Berger's negligence claim was that the City failure to procure and to record a deed constituted a concealment of and misrepresentation about the existence of the easement. Of course, under Government Code sections 815 and 818.8, municipalities are absolutely immune from tort claims based on misrepresentation, whether intentional or negligent. Thus, irrespective of whether any purported tort duty exists, still City was immune from suit.

Courts have consistently applied the rule that

municipalities are immune from suit based on alleged concealment or misrepresentation by City planning and development departments. For instance, in Harshbarger v. City of Colton (1988) 197 Cal.App.3d 1335, 1339-1345, the City was held to be immune from claims by homeowners who had to reconstruct substantial portions of their residence because City building inspectors incorrectly represented that the residences complied with the building code. Another example is Polonsky v. City of South Lake Tahoe (1981) 121 Cal.App.3d 464, 466-467, in which the City was held immune from a claim by a property owner who purchased an unimproved lot in reliance on representations by City personnel that sewer services were available, when it fact they were not.

Berger's citations to section 814 of the Government Code and to Arthur L. Sachs, Inc. v. City of Oceanside (1984) 151 Cal.App.3d 315, 321, are inappropos. Section 814 only states that the provisions of the tort claims act do not apply to contract cases. Sachs, supra, 151 Cal.App.3d at pp.320-323 also holds that section 818.8 does not bar a contract claim based on an allegedly fraudulent breach. These authorities are not persuasive on the issue before us, which is whether Berger's tort claim is barred.

B. Berger's Section 1983 Claim

Berger argues that his section 1983 claim was improperly dismissed before the trial. However, we find that Berger's purported federal constitutional claim was fundamentally deficient and was, therefore, properly dismissed.

Berger's asserted takings claim had two prongs.

First, he alleged that the DIA constituted a "regulatory taking" of all the property because it purportedly imposed improper conditions on the subdivision. Second, he alleged that the lack of a recorded deed of the sewer easement created a cloud on title resulting in a taking--not of the easement--but again of all of the rest of the property. These allegations do not amount to a valid federal takings claim. We review the trial court's decision dismissing the section 1983 claim, not the trial court's reasoning. If the decision is correct, it must be upheld. (Maruman Integrated Circuits, Inc. v. Consortium Co. (1985) 166 Cal.App.3d 443, 450.)

We find that Berger failed to allege a legally cognizable "taking." The federal constitution only protects against two types of takings: 1) possessory takings, where a public entity physically intrudes upon or appropriates the property; and 2) regulatory takings, where a regulation restricting the use of the property goes too far and denies all economically beneficial or productive use of the land and is not rationally related to the proposed us. (Nollan v. California Coastal Comm'n (1987) 483 U.S. 825, 834.) Berger's takings theories were of the regulatory variety.

We find the DIA did not constitute a regulatory taking. The agreement did not impose any conditions upon Berger's right to subdivide the property. Rather, it merely deferred the standard street and utility improvements required by the City Council as a condition of its approval of Berger's subdivision. Also, even considering the improvements required, they were rationally related to Berger's proposed development and did not deny him all economically viable use of his property. (See, e.g. Nollan v. California Coastal Comm'n, supra, 483 U.S. at p.834; Agins v. Tiburon (1980) 447 U.S. 255, 260.)

Berger's alternate theory that the lack of a recorded deed for the sewer easement constituted a cloud on title has even less merit. No case has been cited supporting the idea that a lack of a recorded deed of a sewer line easement results in a taking of the rest of the property. In any event, this supposed cloud on title cannot be argued to have destroyed all economically viable use of the property. On the contrary, Berger operated a restaurant on the property and he also obtained permission to develop a bowling alley. Berger thus had substantial use of the property, foreclosing any federal takings claim.

Even if Berger had alleged a cognizable taking, which he did not, the section 1983 claim was nevertheless incurably defective. In Williamson Planning Comm'n v. Hamilton Bank (1985) 473 U.S. 172, 186, 194, the court held that a federal takings claim is subject to two ripeness requirements: 1) the public entity must have reached a final decision regarding the property; and 2) the owner must have been denied compensation under the procedures provided by state law. These are prerequisites to a viable federal takings claim, and unless both are met, the federal claim is premature and must be dismissed. (Jama Const. v. City of Los Angeles (9th Cir. 1991) 938 f.2d 1045, 1047-1048.)

Berger could not allege compliance with either ripeness requirement. No final decision about the property was made by the public entity. When Berger became upset that all the offsite improvements were being "called" when he developed the bowling alley, then he should have asked the City Council for a correction of the supposedly inaccurate deferred improvement agreement. He could also have asked the City Council to furnish a deed showing where the sewer easement was located. The reason for the final decision

requirement regarding the property is to ensure that the public entity has taken the last step possible with respect to the matter in question, so that the court may know exactly the burden which the entity intends to impose on the property. (Williamson Planning Comm'n v. Hamilton Bank, supra, 473 U.S. at pp.190-191.) For instance, then, a property owner must try to obtain a variance before complaining that a zoning ordinance deprives him of all economic use of the property. (Kinzli v. City of Santa Cruz (9th Cir. 1987) 818 F.2d 1449, 1453-1454.)

The requirement of exhaustion of state law remedies arises from the Fifth Amendment's provision which does not proscribe the taking of property, but prescribes taking without just compensation. If a state has provided an adequate procedure for seeking just compensation, the property owner cannot claim a Fifth Amendment loss until he or she has used the procedure and been denied the compensation. (See Williamson Planning Comm'n v. Hamilton Bank, supra, 473 U.S. at pp.194-195.) Thus, the Supreme Court held in Williamson that respondent's section 1983 takings claim was premature because it had not yet pursued its state law inverse condemnation remedy. (Id. at p.197.) Here, Berger did not and could not allege that he had already pursued a claim for inverse condemnation under state law. The section 1983 takings claim was unripe and subject to dismissal on that ground as well.

C. Limitation of the Condemnation Claim

Finally Berger argues that the trial court improperly limited his state law inverse condemnation claim. The claim had two parts: 1) taking of the sewer easement by installation of the sewer; and 2) taking of the remainder of Berger's property under the same theories he claimed

supported a section 1983 claim. When the trial court rules there was no merit to the taking-of-the-remainder claim, Berger dismissed the claim for the physical taking of the 20 foot wide sewer easement, since any compensation owed for that strip of property was de minimus. We find the inverse condemnation claim for the remainder of the property as lacking in merit as the federal takings claims.

What constitutes a taking under California law is essentially the same as under federal law. (Hensler v. City of Glendale, supra, 8 Cal.4th at p.9, fn. 4; Agins v. City of Tiburon, supra, 24 Cal.3d at p.273.) As demonstrated above, the DIA did not constitute a regulatory taking of the remainder of Berger's property. Berger's "no deed cloud on title: inverse condemnation theory is so farfetched it finds no support whatsoever in the annals of California inverse condemnation law. (See Matteoni & Veit, Condemnation Practice in Cal.2 (2d ed. 1995) §§13.1 et seq. at pp.585-609; Cal. Government Tort Liability Practice, General Liability and Indemnity Principles, §§2.97-2.99 at pp.181-189 (3d ed 1992).) Indeed, as the trial court realized, if Berger's "no deed" allegations gave rise to any sort of claim, it was one for misrepresentation as to the existence of the sewer line easement, from which the City was absolutely immune under section 818.8 of the Government Code.

Again there was a failure on Berger's part to exhaust administrative and judicial remedies before seeking monetary compensation for an alleged taking. As the California Supreme Court explained in Hensler v. City of Glendale, supra, 8 Cal.4th at pp.13-21, where an owner is making regulatory takings claim, he or she must exhaust administrative remedies to free the property from the limits placed on development and to obtain a judicial determination

that just compensation is due, before recovering on an inverse condemnation claim. That is so because a public entity cannot be compelled to exercise its power of eminent domain, but must be given the opportunity to choose between eliminating the restriction or paying just compensation. (Id. at pp.13-14.) In other words, a property owner cannot remain silent in the face of a "'regulatory taking'" and then sue to force the public entity to complete its acquisition of the property by paying compensation. (Id. at p.13.)

Berger here did exactly what the Supreme Court states in Hensler cannot be done. He knew for more than a decade that the DIA did not represent the true bargain between him and City, and he further knew that a deed for the sewer easement had never been brought to the attention of the governing body, the City Council. Berger did not pursue a mandamus or a declaratory relief action to obtain a determination that the City either had to correct or eliminate these matters or pay compensation to acquire his property. Instead, like the Hensler plaintiffs, Berger did nothing and then attempted to compel the City to exercise its power of eminent domain and pay millions in compensation for his property. As the Supreme Court held in Hensler, that is not an election Berger could force the City to make. (8 Cal.4th at p.12.)

The threshold procedural requirements outlined in Hensler are not forgiven just because Berger was told the DIA was only temporary and it would be replaced with another different written contract. Berger knew in early 1977, when Wren said that the City would call the improvements, that this so-called subsequent written agreement was not forthcoming. At this point he could have pursued a mandamus action to determine the validity of the

conditions imposed upon the subdivision of the property so that the issues could be promptly resolved and the City given the opportunity to correct any unconstitutional conditions. (See Hensler v. City of Glendale, supra, 8 Cal.4th at pp.14, 19.)

In sum, Berger's claims on the cross-appeal lack merit.

DISPOSITION

On City's appeal, the judgment is reversed. The trial court is directed to grant JNOV to City on the breach of contract claim. As to the cross-appeal, the judgment in City's favor is affirmed. Each party to bear its own costs. Justice William Wunderlich, concurring Justice Patricia Bamattre-Manoukian and Justice Nathan Mihara.

IN THE SUPERIOR COURT OF THE STATE

CALIFORNIA IN AND FOR THE COUNTY OF SANTA

CLARA

RICHARD B. BERGER and JO ANN BERGER,
PLAINTIFFS,

vs.

CITY OF MORGAN HILL, a municipal
corporation,
DEFENDANT.

No. 687887 (Consolidated
with 701157)

JUDGMENT ON SPECIAL VERDICTS

This action came on regularly for trial on June 9, 1993, Douglas B. Allen and Stephen D. Ink of BURNETT, BURNETT & ALLEN, appeared as attorneys for Plaintiffs RICHARD B. BERGER and JO ANN BERGER, Marc G. Hynes and Emily Cote appeared as attorneys for Defendant, CITY OF MORGAN HILL, a municipal corporation.

A jury of twelve (12) persons was regularly

impaneled and sworn to try the action. Witnesses for both plaintiffs and defendant were sworn and examined. After hearing the evidence, arguments of attorneys, and instructions of the court, the jury members retired to consider their verdicts, and subsequently returned into court, and returned their special verdicts in words as follows:

1. SPECIAL INTERROGATORY

"When did plaintiffs RICHARD and JO ANN BERGER first discover a sewer line existing on their property?

Answer: July 13, 1989."

2. SPECIAL VERDICT FOR NEGLIGENCE

"We, the jury in the above entitled case, find the following special verdict on the questions submitted to us:

Question No. 1: Was defendant City of Morgan Hill negligent?

Answer: Yes.

Question No. 2: Was defendant City of Morgan Hill's negligence a substantial factor in the cause of damage to the plaintiffs?

Answer: Yes.

Question No. 3: Without taking into consideration the reduction of damages due to the negligence of the plaintiffs, if any, what do you find to be the total amount of damages, if any, suffered by the plaintiffs?

Answer: $ 1,265,000.

Question No. 4: Were the plaintiffs, Richard Berger and Jo Ann Berger negligent?

Answer: No."

3. SPECIAL VERDICT FOR BREACH OF ORAL CONTRACT

"We, the jury in the above entitled case, find the following special verdict on the questions submitted to us:

Question 1: Was there an oral agreement between plaintiffs and the City of Morgan Hill?

Answer: Yes.

Question No. 2: Did defendant City of Morgan Hill breach an

oral agreement with plaintiffs Richard and Jo Ann Berger?

Answer: Yes.

Question No. 3: What damages, if any, were suffered by plaintiffs as a result of the breach of the oral agreement by the City of Morgan Hill?

Answer: $ 5,306,282.00

Question No. 4: On what date did defendant City of Morgan Hill breach the oral agreement with plaintiffs?

Answer: Date: August 17, 1976 - Loss of prop. 1991 (Feb)."

Therefore, based upon the special verdicts,

IT IS ADJUDGED, that plaintiffs recover from defendant City of Morgan Hill as follows:

For breach of oral contract:

1. The sum of $ 5,981,282.00;

2. Interest on such sum following entry of judgment; and

3. Costs of suit.

For negligence:

1. The sum of $1,265,000.00

2. Interest on such sum following entry of judgment; and

3. Costs of suit.

July 9, 1993, JOHN A FLAHERTY, JUDGE

IN THE SUPERIOR COURT OF THE STATE

CALIFORNIA IN AND FOR THE COUNTY OF SANTA

CLARA

RICHARD B. BERGER and JO ANN BERGER,
PLAINTIFFS,

vs.

CITY OF MORGAN HILL, a municipal
corporation,
DEFENDANT.

No. 687887 (Consolidated
with 701157)

ORDER AFTER HEARING AND
JUDGMENT NOTWITHSTANDING
THE VERDICT

Defendant CITY OF MORGAN HILL'S motions for Judgment Notwithstanding the Verdict and for New Trial were heard and submitted on September 3, 1993. On September 9, 1993, after careful consideration of the arguments presented by counsel, and good cause appearing as to the negligence cause of action only, the court

announced the following decision:

1) The motion by defendant for judgment notwithstanding the verdict of negligence is granted. Plaintiffs shall take nothing by way of the negligence cause of action.

2) The motion by defendant for judgment notwithstanding the verdict of breach of contract is denied.

3) The motion by defendant for new trial is denied. Therefore,

IT IS ORDERED, ADJUDGED, AND DECREED, that plaintiffs recover from defendant City of Morgan Hill as follows:

1. The sum of $5,306,282.00 for breach of contract;

2. Interest on such sum at a rate of 7% per annum from the date of the jury's verdict on June 18, 1993;

3. Costs of suit.

October 15, 1993

JOHN A. FLAHERTY
JUDGE OF THE SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE

CALIFORNIA IN AND FOR THE COUNTY OF SANTA

CLARA

RICHARD B. BERGER and JO ANN BERGER,
PLAINTIFFS,

vs.

CITY OF MORGAN HILL, a municipal
corporation,
DEFENDANT.

No. 687887 (Consolidated
with 701157)

RULING ON MOTIONS FOR JUDGMENT
NOTWITHSTANDING THE VERDICT
AND FOR NEW TRIAL

I. INTRODUCTION

Defendant's alternative motions raise a number of basis issues. The court will first address the issues raised by

defendant's motion for judgment notwithstanding the verdict, dealing first with negligence verdict and then review briefly the contentions on the motion for new trial.

II. MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AS TO NEGLIGENCE

The motion by defendant for judgment notwithstanding the verdict of negligence is granted. This court instructed the jury that the City owed plaintiffs the following duty of care:

> It is the duty of a city, such as the defendant City of Morgan Hill, in acquiring easements from private property owners, to take such steps as are reasonable and prudent perfecting the City's property interest. Once a sewer has been installed, the City has a duty to inform the property owner of the exact location of the sewer and provide the owner with a legal description of the easement required. A failure to fulfill any such duty is negligence.

This court gave that instruction expressing some reservations because of a lack of authority to support it. In retrospect, the instruction should not have been given. As pointed out by defendant, the basis of any negligence claim is an actionable duty of care. Before a negligence claim can properly be sent to a jury, the trial court must decide as a matter of law that the defendant owes a duty of care to plaintiff and the proper boundaries of that duty. Moore v. Regents of the University of California (1990) 51 Cal.3d 120, 135 n.16. Where no duty of care exists, the defendant is entitled to judgment. Andrews v. Wells (1988) 204

Cal.App.3d 533, 542. Plaintiffs have argued that the refusal of the City to identify the location of the sewer and provide a description of the easement placed a cloud on plaintiffs' property and made it impossible for plaintiffs to sell the property. Plaintiffs persuaded the court that that "cloud on the property" was a separate tort from misrepresentation by City officials. On further reflection, the court believes that even assuming a duty on the part of the City in this case, any cause of action is predicated on the City's concealment or negligent misrepresentation as to the location of the sewer. Such misrepresentations or concealment are properly subject to the immunity provided public entities under California Government Code §818.8, which provides that public entities are immune from liability for injuries caused by misrepresentations of their employees, whether or not such misrepresentations are negligent or intentional. The motion for judgment notwithstanding the verdict of negligence is granted because the court concedes error in two respects. The City was under no duty as set forth in the court's instruction, and even if such duty were to exist, California government immunity would prevent this issue from reaching the jury.

III. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON BREACH OF CONTRACT

The motion for judgment notwithstanding the breach of contract verdict is denied. Defendant contends that judgment notwithstanding the verdict should be entered for the City because the breach of contract was found to have occurred in August of 1976, and the statute of limitations operates to bar a verdict. The jury made a special finding that the oral agreement between the parties was breached on August 17, 1976. In a separate interrogatory, the jury found

that plaintiffs did not discover the existence of the sewer line on their property until July of 1989. The court agrees with plaintiffs that the date of discovery of the breach is the crucial date for the purpose of determining this issue. See April Enterprise, Inc. v. K.T.T.V. (1983) 147 Cal.App.3d 805. The jury heard all of the facts of the case and were instructed on the applicable two-year statute of limitations for breach of oral contract.

Defendant also argues that judgment notwithstanding the verdict should be entered in its favor on the ground of the statute of frauds. The court disagrees. The City may be correct that the doctrine of part performance for purposes of the statute of frauds is limited to actions for a specific performance of contract. See Paul v. Layne & Bolwer Corporation (1937) 9 Cal.2d 561, Matheron v. Ramina Corporation (1920) 49 Cal.App. 690. However, the contract may be taken outside the statute of frauds based alternatively upon full performance or estoppel. Under the doctrine of full performance, the statute of frauds has been held inapplicable where one party has fully performed. See Prince v. Varona (1956) 144 Cal.App.2d 673. Under the doctrine of estoppel, a defendant may be estopped from asserting the statute of frauds in an action on an oral contract if the plaintiff, in reliance upon it, has so changed his position that unconscionable injury would be suffered, or the defendant, having accepted the benefits of the oral contract, would be unjustly enriched by nonenforcement. See Witkin, Summary of California Law Contracts, 9th ed. §325, page 305, citing Monarco v. LoGreco (1950) 35 Cal.2d 621, 623. Contrary to the City's contentions, either of the above doctrines properly applies here, where the City placed its sewer on plaintiffs' property pursuant to an oral agreement with plaintiffs.

Defendant also moves for judgment notwithstanding the verdict contending that no City employee had authority to enter into a contract overriding the City Council's legislative functions. The evidence in this case established that on June 2, 1976, the City Council passed Resolution No. 1174, giving the City authorization for the acquisition of lands and easements necessary for the construction of the downtown sewer bypass. That authority empowered the City to obtain easements for the installation of the downtown sewer bypass across plaintiffs' property. City Manager Moreno was given authority to obtain the necessary easements. The evidence established that the City Manager of the City of Morgan Hill under City Code 2.08.040, as "administrative head of the city government" and the "chief administrator," had the power to employ such means as are appropriate and necessary to carry out his duties. Evidence was presented that City Manager Moreno formulated the offer to be made to plaintiffs and then turned the matter over to his subordinates to accomplish that task. The court agrees with plaintiffs that the City officials here had the actual or ostensible authority to make the offer that they did to plaintiffs concerning the oral agreement that the jury found.

IV. THE MOTIONS FOR NEW TRIAL

Each of the motions by defendant for a new trial is denied. Defendant contends that Jury Instructions Nos. 24 and 30 were improper because they addressed implied in contract or quasi contract issues and the parties did not argue implied or quasi contract terms. The court agrees with plaintiffs that if giving those instructions was error, the error was harmless.

Defendant also asks for a new trial on the ground that

the damages awarded on the contract cause of action are excessive and speculative. The jury award for breach of the oral contract compensated plaintiffs for the value of their property based on the establishment of a bowling alley on that property. That jury award did not include damages for loss of profits on a bowling alley operation. Defendant contends that plaintiffs failed to establish evidence that they could have completed a bowling alley on the property. The evidence offered by plaintiffs may have been able to establish a bowling alley on the property. In the case of S. John Kreedman and Company v. Meyers Brothers Parking--Western Corp. (1976) 58 Cal.App.3d 173, 184-185, the damage calculations of a brand new business were upheld even though the business had not been established.

Dated: September 9, 1993
JOHN A. FLAHERTY, JUDGE OF THE SUPERIOR COURT

CONSTITUTION AND FEDERAL LAWS CONSTRUED

The Constitution Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution Amendment 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC §1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding for redress.

Supreme Court, U.S.
FILED
MAR 14 1996
CLERK

No. 95-1345

In The

Supreme Court of the United States

October Term, 1995

RICHARD B. BERGER and JOANN BERGER,

Petitioners,

vs.

CITY OF MORGAN HILL, a Municipal Corporation,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Sixth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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I

PRELIMINARY STATEMENT

The question presented to the Court bears little semblance to the case plaintiffs Richard and JoAnn Berger filed and pursued in the California state courts. The gravamen of their case was that the City of Morgan Hill breached an oral agreement purportedly made 30 years ago by an assistant City administrator. Specifically, they claimed they were promised a host of development concessions – including that the City would abandon an adjacent public road and allow that property to revert back to them, eliminate the standard street and utility improvements required for their subdivision, waive all development fees in perpetuity, and cooperate with any and all development plans, including giving them zoning – all in exchange for a 20 foot-wide, underground sewer line easement just inside the boundary of their property.

The City denied that any employee ever made such a deal with plaintiffs. City records showed that the only proposed agreement was a $3000 credit against development fees, which plaintiffs received. It was undisputed, in any case, that the City Council never approved any agreement of the sort claimed by plaintiffs. The California Court of Appeal accordingly held in an unpublished opinion that under California law the alleged oral agreement was the "consummate ultra vires act" and directed that judgment be entered for the City. The California Supreme Court denied plaintiffs' request for review.

Plaintiffs also pursued a host of other claims early in the case, including a federal "takings" claim asserted under 42 U.S.C. section 1983 and a state law "inverse

condemnation" claim. These claims were largely identical and focused principally on plaintiffs' contention that the City had "taken," *not* the underground sewer line easement (the value of which was *de minimis*), but the *rest* of their 5.7 acre parcel. Although the City never used or possessed the rest of their property and they lost it through foreclosure, plaintiffs claimed a "taking" had nevertheless occurred (a) because of an agreement deferring the street and utility improvements required under their subdivision map and (b) because no deed for the underground sewer line easement was recorded. The trial court dismissed these "takings" claims, and the California Court of Appeal affirmed on multiple grounds.

Plaintiffs now assert that this predominately state law case presents a burning federal question that should be considered by this Court – whether the requirement that state compensation procedures must be pursued before a federal "takings" claim can be stated, impermissibly imposes an exhaustion of administrative remedies requirement on "takings" claims made actionable under 42 U.S.C. section 1983. This question, however, is not properly presented by this case.

To begin with, plaintiffs never raised this question at any stage of the state court proceedings below. Rather, the only argument they ever made was that their federal "takings" and state law "inverse condemnation" claims were not barred by state law immunities. The California Court of Appeal agreed with plaintiffs on this point, but held that their federal and state "takings" claims were legally deficient for numerous other reasons, including that they simply failed to allege a cognizable "taking." Plaintiffs did not seek review by the California Supreme

Court of the rejection of their federal "takings" claim. Accordingly, they did not preserve the question they now proffer for consideration by this Court. *E.g., Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Furthermore, plaintiffs' federal "takings" claim is legally and incurably defective for two threshold reasons, and the question they present therefore would never be reached. First, they failed to allege a cognizable "taking" as the California Court of Appeal ruled. Absent a "taking," of course, there can be no viable "takings" claim. Second, they failed to allege that they had procured a "final" determination by the City, since they never sought clarification of or an exception from the actions about which they later complained. Each of these problems independently renders plaintiffs' federal "takings" claim legally unsustainable. Whether their claim fails for yet a third reason, because they also did not pursue state law compensation procedures, adds nothing to the equation in this case.

Finally, plaintiffs cite no authority in support of their unpreserved, eleventh hour argument that the well established requirement that state law compensation procedures must be pursued before a federal "takings" claim can be stated, is inapplicable where state law compensation procedures include administrative, as well as judicial, remedies. Indeed, plaintiffs' argument reflects a fundamental misunderstanding of the purpose and import of this requirement.

In sum, the California Court of Appeal did not go astray in rejecting plaintiffs' federal "takings" claim along with all the other meritless claims they pursued in this case. The unpublished California decision does not create a conflict on any federal issue. Nor did the state court purport to decide any vital federal issue of first impression. On the contrary, it duly applied well established federal precedent in disposing of plaintiffs' "takings" claim. There is no issue in this predominantly state law case that merits consideration by this Court, and plaintiffs' petition for writ of certiorari should be denied. *See* S. Ct. R. 10(b) and (c).

II

STATEMENT OF THE CASE

The California Court of Appeal's opinion adequately sets forth the facts for purposes of this petition. Plaintiffs' frequent and ebullient departure from the facts as stated by the state court reflects their obdurate refusal to acknowledge the facts as shown by the record. It is the record, however, and not plaintiffs' fanciful and unproven accusations that are controlling.

III

THE CALIFORNIA COURT OF APPEAL CORRECTLY REJECTED PLAINTIFFS' FEDERAL "TAKINGS" CLAIM

Plaintiffs' asserted "takings" claim had two prongs. They first alleged that an agreement they signed deferring the standard street and utility improvements

required for their subdivision constituted a "taking" of their entire 5.7 acre parcel. (App. 63-65)[1] Secondly, they alleged that the lack of a recorded deed for the underground sewer line easement created a "cloud" on title, again resulting in a "taking" of all of their property.[2] (App. 63-65) The California Court of Appeal first examined whether these allegations stated a cognizable "taking" and correctly concluded that they did not. (Pet.App. 26-27)

The deferred improvement agreement did not constitute a "taking" for at least two reasons. First, that agreement did not impose *any* conditions on plaintiffs' four-lot subdivision. Rather, it merely *deferred* the standard street and utility improvements required by the City Council as a condition of its approval of plaintiffs' subdivision. (App. 553-55)

Second, even considering the standard street and utility improvements required by the Council, the

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[1] "App." citations are to the Appellant's Appendix filed in the California Court of Appeal and containing the relevant pleadings and documents. "RT" citations are to the Reporter's Transcript filed in the California Court of Appeal. "Pet.App." citations are to appendix to plaintiffs' petition for writ of certiorari.

[2] They never alleged, as part of their federal "takings" claim, that the City had "taken" the easement for the underground sewer line. While they initially included such a claim as part of their state law "inverse condemnation" claim [App. 70-71], they voluntarily dismissed it when the trial court rejected their deferred-improvement-agreement and cloud-on-title "takings" theories for the *rest* of their property, since the value of the easement itself was *de minimis* [RT 95].

improvements were rationally related to plaintiffs' proposed development and did not deny them all economically viable use of their property. *See Lucas v. So. Carolina Coastal Council*, 505 U.S. ___, 120 L.Ed.2d 798, 812-15 (1992); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). On the contrary, standard street and utility improvements, like those required by the City Council, are the *sine qua non* of permissible regulatory conditions on development. *E.g., In re Park Beyond the Park*, 157 B.R. 887, 890 (9th Cir. BAP 1993) (developer required to provide additional parking); *Commercial Builders of No. Cal. v. City of Sacramento*, 941 F.2d 872, 874-75 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) (non-residential developments required to pay fees offsetting housing costs of low-income workers); *Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 696, 699 (9th Cir. 1991) (developer required to make off-site improvements to ameliorate erosion and other environmental effects of proposed development). It therefore comes as no surprise that plaintiffs have ***never*** cited a single case, either in the courts below or in their petition, that so much as suggests that an agreement deferring standard street and utility improvements constitutes a "taking" of the subdivided property served by those health and safety related improvements.

Plaintiffs' contention that the deferred improvement agreement misstated the standard street and utility improvements required by the City Council – because it allowed the improvements to be required all at one time, rather than on a lot-by-lot basis as plaintiffs developed the property – does not change the analysis. Whether required when the first of the four lots was developed, or on a lot-by-lot basis, the standard street and utility

improvements were rationally related to the planned commercial development of the property, did not deprive plaintiffs of all economically viable use of the property, and did not conceivably constitute a "regulatory taking."[3] *See* cases cited, *supra*, at 6.

Nor was the deferred improvement agreement inconsistent with the City Council's approval of plaintiffs' subdivision. When it approved their subdivision, the City Council did ***not*** specify that the standard improvements were only to be made on a lot by lot basis as each was developed. (App. 598, 601) The Council subsequently made deferrals of some of the improvements, first, in connection with the conditional use permit for the restaurant (deferring the improvements on the remaining lots) and, second, in connection with the conditional use permit for the bowling alley (continuing the deferral of some improvements). (App. 587, 588, 598, 601) But there was *never* any requirement in the subdivision approval that it do so. (*Compare* App. 599, 601, *and* 587, 588, 598, 601)

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[3] In fact, only the improvements for one of the four lots was even in dispute. Plaintiffs began developing one lot with a restaurant as soon as their subdivision was approved. (App. 598, 601) They later proposed developing two more lots with a bowling alley [App. 581, 582, 587, 588], which under their theory, would have necessitated making the improvements for those lots. Their claim accordingly boiled down to the contention that the deferred improvement agreement incorrectly required them to make the improvements for the single remaining lot at the time they planned to complete commercial development of three-quarters of the property. Again, this did not come close to being a regulatory "taking" of plaintiffs' property.

Plaintiffs' "no-recorded-deed-cloud-on-title" takings theory was even more far fetched. Again, they have *never* cited a single case supporting the notion that the lack of a recorded deed of a sewer line easement results in a "taking" of the *rest* of the property.[4] Nor could they allege that the supposed "cloud" destroyed all economically viable use of the property. Not only did they continue to maintain a restaurant on the property, they also obtained permission to develop a bowling alley.[5] Thus, they retained substantial use of the property, foreclosing any federal "takings" claim. *See* cases cited, *supra*, at 6.

The California Court of Appeal could have rested its decision entirely on the ground that plaintiffs failed to state a cognizable "taking," since a "taking" is an essential requisite of a "takings" claim. The appellate court

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[4] Furthermore, although plaintiffs denied knowing that the sewer line had actually been installed, they always knew the general location of the easement, even without having given a deed. They were told the City needed an easement to go around a water well in the street where the sewer line was being installed [RT 1082, 1122-23], and they signed a temporary construction easement which specifically made reference to an attached map and legal description of the sewer line easement [App. 611, 616, 617]. Thus, it was clear from the beginning that the easement was just inside their property line along the street in question.

[5] Plaintiffs' claimed inability to proceed with the bowling alley because of a lack of financing, had *nothing* to do with the recording of a deed for the sewer line easement. Rather, they attributed that problem solely to their obligation to make the standard street and utility improvements required by the City Council. (RT 304-05, 330-31, 591-92, 1282-83, 1510, 1530) *See* discussion, *supra*, at 5-7.

went on to observe, however, that plaintiffs' alleged claim also failed to meet the "ripeness" requirements for a federal "takings" claim. (Pet.App. 27-28) In *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 194 (1985), the Court held that a federal "takings" claim is subject to two "ripeness" requirements: (1) the public entity must have reached a "final" decision regarding the property, and (2) the owner must have been denied compensation under the procedures provided by state law. These "ripeness" requirements are additional elements of a federal "takings" claim, and unless *both* are met, a federal claim is premature and must be dismissed. *E.g.*, *Jama Const. v. City of Los Angeles*, 938 F.2d 1045, 1047-48 (9th Cir. 1991), *cert. denied*, 503 U.S. 919 (1992); *Austin v. City and County of Honolulu*, 840 F.2d 678, 682 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988). Plaintiffs did not, and could not, allege compliance with either requirement.

The requirement that there be a "final" decision concerning the property insures that the public entity has taken the last step possible with respect to the matter in question, so that the courts know exactly the burden which the entity intends to impose on the property. *E.g.*, *Williamson Planning Comm'n*, 473 U.S. at 190-91. Thus, a property owner must, for example, attempt to obtain a variance before complaining that a zoning ordinance deprives property of all economically viable use. *Id.* at 187-94; *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988). Here, plaintiffs never returned to the City Council to ask for clarification or a correction of the deferred improvement agreement. Likewise, they never attempted to tender a deed of the easement. Nor did they ever ask the City

Council to prepare a deed any time prior to 1989 that they could execute, delineating the boundaries of the easement.

There is no merit to plaintiffs' argument, belatedly made here for the first time, that these available alternatives did not go to the "finality" of the challenged actions, but rather were "administrative remedies" to be invoked after a "final" determination. As the Court explained in *Williamson Planning Comm'n*, asking the *initial* decision-making body for reconsideration or modification is not the same thing as appealing a final decision to a higher body or state court. 473 U.S. at 193-94. Plaintiffs simply did not avail themselves of the readily available means to secure the "final" word of the City on the deferred improvement agreement or a deed for the sewer line easement.

The California Court of Appeal also could have rested its decision on the lack of any "final" decision by the City since that, alone, was another fatal shortcoming in plaintiffs' federal "takings" claim. *See* cases cited, *supra*, at 9. The state court noted, however, that plaintiffs' claim was defective for yet a third reason because they could not allege the lack of an adequate state procedure for providing "just compensation." (Pet.App. 28) As the Court explained in *Williamson Planning Comm'n*, 473 U.S. at 194-95, "[t]he Fifth amendment does not proscribe the taking of property; it proscribes taking without just compensation. . . . If a state provides an adequate procedure for seeking compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied compensation." Plaintiffs did not and could not allege that they had

already pursued a claim for "inverse condemnation" under state law. Accordingly, their federal "takings" claim was defective for this reason as well.

Plaintiffs argue, again for the first time, that this requirement should not have applied to their alleged federal claim because California's compensation procedures include pursuing administrative remedies. They maintain this imposes an impermissible "exhaustion requirement" on a section 1983 claim. Even if the other fundamental deficiencies in their federal "takings" claim, plus their failure to preserve the issue were all overlooked, plaintiffs misunderstand the requirement to pursue state law compensation procedures. The lack of "just compensation" is a *substantive* component of a federal "takings" claim, not an exhaustion requirement. *Id.* at 194-97. Thus, whether state compensation procedures require administrative, as well as judicial, proceedings does not excuse a plaintiff seeking to allege a federal "takings" claim from pursuing those procedures.

Finally, plaintiffs suggest, also for the first time, that they did not limit themselves to a "takings" claim, but also pursued an undefined "due process" claim that purportedly is not subject to the requirement to pursue state law compensation procedures. *Id.* at 197-200. Plaintiffs, however, cannot remanufacture their federal claim at this late date. It was pled and pursued throughout the state court proceedings as a "takings" claim, *i.e.*, "said taking has constituted a complete deprivation of the use of plaintiffs' property" (Third Amended Complaint [App. 64]), "such actions constituted the taking of all of Mr. Berger's property" (Cross-appellants' Opening Brief at 8), "when a city takes property . . . does it incur liability for

the loss of that property" (Plaintiffs' Petition for Review at 5), and the California Courts accordingly addressed and dealt with it as a "takings" claim. Plaintiffs cannot urge an entirely different approach now.

Furthermore, the Court in *Williamson Planning Comm'n* expressed substantial doubt about whether a plaintiff making a regulatory "takings" claim could relabel it a "due process" claim to avoid pursuing state compensation procedures. *Id.* at 198-99. Indeed, while plaintiffs purport to quote the Court as approving such a stratagem [Pet. 7-8], they have in fact quoted the Court's summation of the respondent's argument in that case, which the Court went on to question without resolving the issue. *Id.* at 197-99. This issue also cannot be resolved in this case, since it was never pled or pursued by plaintiffs.

IV

CONCLUSION

Plaintiffs ask whether the "ripeness" requirement to pursue state law compensation procedures impermissibly imposes an exhaustion of administrative remedies requirement on "takings" claims made actionable under 42 U.S.C. section 1983. But this question does not warrant the Court's attention. It was never raised below. It is irrelevant because plaintiffs' "takings" claim is legally

deficient for at least two other reasons. And it has no merit. The petition for writ of certiorari should be denied.

DATED: March 14, 1996.

Respectfully submitted,

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(3)

No. 95-1345

In The

Supreme Court of the United States

October Term, 1995

RICHARD BERGER AND JO ANN BERGER,

Petitioners,

v.

THE CITY OF MORGAN HILL, CALIFORNIA, A MUNICIPAL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Sixth Appellate District

PETITIONERS' REPLY BRIEF

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I. THE BRIEF IN OPPOSITION HAS PROVIDED NO RESPONSE TO THE QUESTION PRESENTED

The California Courts held that state law claims in tort and inverse condemnation were barred by California governmental immunity under Government Code §818.8. The California Court of Appeal while at once conceding that state immunity does not apply to municipal corporations to bar a claim under 42 U.S.C. §1983 (hereinafter "§1983"), simultaneously barred the §1983 claim for failure to pursue state compensation which it likewise barred. The practical effect is to bar the §1983 claim due to state law immunity. Respondent has provided no answer or explanation for this error.

Respondent has misrepresented that the Deferred Improvement Agreement ("DIA") was imposed as part of the original subdivision approval. It was not. It arose as a separate contract subsequent to the subdivision approval modifying the imposition of offsite improvement requirements. The modification by the DIA required the immediate development of all of the offsite improvements following a separate one year deferral as opposed to installation along the frontage of each of the subdivided lots as each lot was individually developed.[1] The California Court of Appeal reasoned, in addition to the immunity bar, that the state based claims for compensation by inverse condemnation were barred because petitioners did not approach the City Council without formal

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[1] Trial Court Reporter's Transcript p.234, p.244, p.1126; Joint Appendix to the Court of Appeals pp.599 & 601.

procedure and asked to be relieved of the contract obligations, or file an action in court to set aside the contract. Both of these actions are remedial in nature as an executed recorded contract is final, and subject to no other administrative action to become a cloud on the title of the land by lien. Imposition of the remedial exhaustion requirements upon the state based claims for compensation while simultaneously barring the federal §1983 claims because of the availability of state compensation is to effectively apply the exhaustion of remedial action requirement on the §1983 claims. Specifically, California is applying its doctrine of exhaustion of remedial action set forth in *Hensler v. City of Glendale*, 8 Cal.4th 1 (1994), to federal §1983 claims. Respondent provided no argument or law in response to this error.

What respondent has done is to misrepresent to this Court that these arguments and the due process claims were not preserved by being presented to the California Courts. Contrary to these misrepresentations, these issues were clearly framed to the California Courts. The complaint in the trial Court which framed the 42 U.S.C. §1983 action. It described the facts of the recordation of the DIA lien and the failure to identify the location of the sewer line. The complaint asserted under alternative theories that these actions constituted a regulatory taking and/or substantive due process violation. (Joint Appendix to the Appellate Court, pp. 63-65.)

The trial Court dismissed all of the claims except for contract as barred by state law immunity including the §1983 action. The Court of Appeal while conceding that the reasoning of the trial Court was erroneous upheld the dismissal because of the availability of the state claims

which it otherwise barred on bases not applicable to the federal claim. On Petition for Rehearing, petitioners raised the error asserted herein.

> The 'Deferred Improvement Agreement' unifying the four subdivided parcels contrary to the original subdivision approval remains recorded even today. The recordation of the DIA was done through fraud and artifice, not due process of law, and is not a regulatory taking but a physical taking done without compensation.[2]

Likewise in the petition to the California Supreme Court, the arguments were as well raised by petitioners,

> . . . The application of the statutory immunity under Government Code §818.8 is being given preference over the constitutional guarantee of compensation for takings by the government . . . Insofar as it did constitute an action covered under Government Code §818.8, such statutory immunity provision could not work to defeat the constitutional right of the Bergers to compensation for loss of their land arising out of the actions of the City and acquiring an interest in their land and directly interfering with free alienability of the remainder of the parcels.
>
> The application of this Government Code section to the whole takings concept leads to circular reasoning. The failure of the inverse condemnation action as well as other state based claims on the basis of immunity was used to demonstrate that the lack of exhaustion of state

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[2] Page 10, Petition for Rehearing in the Court of Appeals State of California Sixth Apellate District filed September 7, 1995.

> based claims which barred the federal taking claim. Thus, the statutory immunity creates the cornerstone to facilitate the City's complete confiscation of the Bergers' property without providing any compensation.[3]

Finally, respondent's attempt to malign petitioners by misstating the facts of the case. As previously stated respondent in its opposition has misrepresented the nature of petitioners' §1983 claims and the origination of the DIA agreement. Respondent boldly asserts that petitioners " . . . always knew the general location of the easement . . . " yet such assertion is clearly contradicted by the jury findings and the verdicts. The jury found that petitioners did not discover the sewer until 1989 and found the City *never* identified the location by finding them liable in negligence for not disclosing the location. (Appendix to the Petition for Certiorari, pp. 33 and 34.) The reason for these findings is that the testimony was that no map or description was ever provided to petitioners.[4]

Additionally, although the contract action is irrelevant here, it is argued in the opposition to the petition for certiorari by respondent. The jury found a contract for development concessions which when breached damaged petitioners in the amount of $5.3 million. There was no evidence that the contract was for $3,000.00. This is a rehash of the wistful argument of respondent rejected by

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[3] Petition for Review to California Supreme Court, pp.21-23, filed October 2, 1995. In addition, see generally the same petition pages pp.15-23.

[4] Reporter's Transcript from trial pp.261-262, ln.8.

the jury. There was evidence at trial that the City Council made a knowing ratification of the contract which was accepted by the trial judge but the California Court of Appeals refused to allow a retrial even though such authorization should have been implied by the general verdict.[5]

II. CONCLUSION

Petitioners have properly preserved the questions presented to this Court. The facts of the case uniquely and justifiably raise the issues to be considered. The questions presented are of great public interest and this case demonstrates the need for federal protection of private property rights against ever widening indifference to unconstitutional deprivation by municipalities.

The simplicity of the gross injustice of this case is compelling. Petitioners have been completely deprived of their property by fraud perpetrated by the respondent, City, without due process or compensation. The California Court of Appeals and the Supreme Court in their reasoning have acted as instruments to further facilitate the confiscation of petitioners' property without compensation or due process of law.

Dated: April 8, 1996

Respectfully submitted,

BURNETT, BURNETT & ALLEN

DOUGLAS B. ALLEN

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[5] See Petition for Rehearing, filed September 7, 1995, pp.2-7, and the Petition for Review filed October 7, pp.23-27.